Chapter 5

Judiciary and Cultural Rights of the Individual Member

The law constitutes reality as well as is constituted by it. Even as courts structure reality to follow law, it is constantly influenced by the surrounding milieu to interpret the law in a certain way.

When courts come to apply legal rules, they are frequently confronted by difficult questions of interpretation. Factual situations do not come neatly packaged and labeled in legal vocabulary and there can be ample scope for doubt about whether a particular legal rule should or should not be applied in the individual case? Generally, the meaning of an utterance will be a function of formal linguistic rules in conjunction with the implications of the pragmatic content of the utterance. But legal rules frequently lack any obvious pragmatic context: they may have been enacted long ago with intentions that are now obscure, but they nevertheless purport to regulate the present.1

The judicial organ in trying to mediate between formal linguistic rule and context vacillates between two extreme positions what Hart called ‘formalism’ and ‘rule-skepticism’. By ‘formalism’ he meant the view that all conceivable cases can be decided by applying pre-existing rules of law, without any need to ask questions about non-legal considerations such as justice or social policy. ‘Rule-skepticism’, on the other hand, is the view that judges are never really bound by rules, so that the decisive factors in each case are always extra-legal considerations of social policy. As Hart pointed out formalism ignores the fact that language exhibits an ‘open-texture’: while words have a ‘core of settled meaning’ they also possess a ‘penumbra of uncertainty’ where it will be unclear if the word is properly applicable or not. In
so far as legal rules are linguistic entities they too will exhibit this ‘open texture’. Cases of penumbral uncertainty will inevitably arise in any conceivable system of laws, and such cases can only be handled by the court exercising its discretion. On the other hand, rule-skeptics (Hart argued) overestimate the extent of penumbral uncertainty and ignore the fact that the great majority of cases fall within the ‘core of settled meaning’ of the rule.2

Justice Kuldip Singh observed, “It is not enough merely to interpret the constitutional text. It must be interpreted so as to advance the policy and purpose underlying its provisions. A purposeful meaning which may have become necessary by passage of time and process of experience, has to be given. The Courts must face the facts and meet the needs and aspirations of the times. Interpretation of the Constitution is a continual process.” “The constitutional provisions cannot be cut down by technical construction rather it has to be given liberal and meaningful interpretation. The ordinary rules and presumptions, brought in aid to interpret the statutes, cannot be made applicable while interpreting the provisions of the Constitution.” Justice Ahmadi, as he was then, also observed while issuing a warning that where the words are unambiguous, effect must be given to them, as that was the constituent body’s intent.3

In another case, R C Poudyal v. Union of India, the majority observed: “In the interpretation of a constitutional document, words are but the framework of concepts, and concepts may change more than words themselves.” “The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of the words without an acceptance of the line of their growth.”4
As mentioned in Chapter three, statements about Culture in any legal or political philosophy is extracted from a certain social and historical context. They are therefore liable to ignore its shifting political meanings. We need to be cognizant of the role played by the law in essentializing categories and fixing identities, as a concomitant of its task of developing general principles to include, ideally, all possible cases.

The law also plays a crucial role in recognizing, upholding and ironically restraining rights. In other words, the two propositions of rights – rights as absolute and rights as indefeasible are upheld as well as restrained by the legal structure. This chapter examines this role of the judiciary with regard to cultural rights of the member in an individual capacity vis-à-vis the cultural community in India. This is done through a study of cases dealt by the Indian judiciary. The reason for looking at case law is to substantiate the theoretical position of the thesis. Case studies enable a stronger grounding of the conversation between theory and practice. The public assertion of belief in these court cases reveals an emerging individual identity confronting the taxonomic machinery of state apparatuses.

The cases are discussed under the following categories – the degree of importance accorded to religion, the secular routes to secure an autonomous mediation of identity, the efficacy of the strategy to resort to Fundamental Rights in resisting constitution of cultural identity by the dominant interpretations, the impact of Muslim Women Act, 1986 on case law, scope of Section 125 Cr.PC, and the judiciary’s view of the Uniform Civil Code.

*Personal Laws – religious or legal category*

Before the discussion on cases, let me deal with the question whether Personal Laws fall under the legal category or under laws categorized on the basis of
religion. Since the only codified Personal Law is the Hindu Personal Law, let me try to examine the constitution’s intention of viewing it as a legal or religious category.

While the term ‘Hindu’ refers to a religion, as a codified law, it needs to be specified whether the category of Hindu is a religious category as legislated in the Personal Laws or a legal category. As pointed by Baird, Explanation II of Article 25 (2) (b), there is a difference between ‘Hindu religion’ and ‘Hindu’ as a legal category. The stipulation in Article 25 (2) (b) is to be taken to include persons professing the Sikh, Buddhist, or Jaina religion suggests that as religions these are distinguishable from ‘Hinduism’ as a religion, but that before the law they are to be included within the category of ‘Hindu’. The Bills passed in 1955 and 1956, commonly referred to as the Hindu Code Bill, continue this distinction between Hinduism as a religious and legal category. The Hindu Succession Act of 1956 applies the Act as follows:

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat, or a follower of the Brahmo, Prarthana or Arya Samaj;

(b) to any person who is a Buddhist, Jain or Sikh by religion; and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

The Hindu Marriage Act (1955), the Hindu Adoptions and Maintenance Act (1956), and the Hindu Minority and Guardianship Act (1956) use almost identical language. This has been endorsed by the Courts as is evident in several cases including
that of Gogireddy Sambireddy v. Gogireddy Jayamma. The court in this case held that ‘the body of personal law known as Hindu law was neither the personal law of all Hindus, nor was it the personal law exclusively of Hindus.’

The legislature however has not been consistent in maintaining the concept of Hindu as a legal category. For example, Section 26 of the Hindu Succession Act that disqualifies a convert’s heir clearly views Hindu as a religious category. (See Chapter 4 on this).

The Court too has been inconsistent in viewing the term ‘Hindu’ as a legal as well as a religious category. It was held in Subramanian v. Vijayarani that a careful reading of section 26 of the Hindu Succession Act would establish that a Hindu ceased to be a Hindu by conversion to another religion and the children born to him or her after such conversion shall be disqualified from inheriting the properties of their Hindu relatives.

In the process of deciding who is covered under the term ‘Hindu’ as legal category the Court also began to determine what comes under religious Hinduism. Over the years while the Courts have frequently asserted and determined who is and who is not a Hindu in the religious sense, the point that the term Hindu is a legal category and not a religious category has been relegated to the back burner.

Though not a Personal Law codified by the state, the issue of Personal Law to be viewed as a legal rather than a religious category did emerge with regard to the Muslim Personal Law before the courts in 1983. Shahnaz Sheikh filed a petition against the Union of India and her husband Abdul Rab Ravish. Abdul Rab Ravish divorced Shahnaz Sheikh orally and threw her out of the house without giving her the mehr. Shahnaz stated in her petition that she was not claiming any relief from her ex-husband. The petition stated: ‘The Petitioner says that she does not blame the
Respondent No.2 for whatever has happened to the Petitioner as the Petitioner feels that the Respondent No. 2 has behaved in the manner he has done only because the existing personal law is so much loaded in his favour.⁹

Shahnaz laid the responsibility for her oppression on the state. She went on to dismiss the excuse put forward by political leaders that they had left it to the leaders of the Muslim community to initiate reform from within the community. As the petition pointed out: ‘The Petitioner says that by their default in this regard, Respondent No. 1 has allowed the beneficiaries of a socially unbalanced law to continue superiority over Muslim women at their option.’ The Petition felt that the Islamic faith and legal provisions needed to be separated as one could be a believer and yet not believe in the validity of Muslim Personal Law.¹⁰

Shahnaz found herself isolated within the woman’s movement as well: ‘...even within the woman’s movement, I felt my minority status, felt this is Hindu feminism. They were all very nice people, but they were not trying to understand me’¹¹ Her stand also isolated her within the community and this isolation led her to withdraw her petition.

The petition is a clear indicator to the point made by Sangari that the state supports patriarchal interests on religious grounds. The defence of patriarchal arrangements, privileges, and/or the sexual regulation of women is represented not just as the defence of religion but also as the defence of religious rights.¹²

So though Article 25 does make it clear that the term Hindu is to be viewed as a legal category, the courts have steadily over the years made the religious aspect the determinant aspect in the application of the Hindu Code Bill. Worse, the courts have taken it upon themselves to determine what is religious and what is not. This is more than evident in the importance accorded to religion by the courts.
Cases on Indispensability of Religion and Personal Laws

The Indian judiciary has proved time and again that it is not open to the concept of an identity that does not have a religious component. Far from entertaining any concept of an agnostic, there is no concept of even an atheist. This is violative not only of the secular ideal as enshrined in the Indian constitution, but also of Article 25 that guarantees freedom of conscience in the practice of religion. To the extent it is inconceivable for the judiciary to imagine an identity minus a religious component, it is equally inconceivable for it to think of an individual exercising choice and agency in matters of religious and cultural identity.

A few cases have been cited below to point out the importance accorded to religion by the judiciary.

In Thangappan v. Subadra the judge G Ramanujam referred to the following statement made by Venkataramana Rao, J. in an earlier case. ‘The personal law of a person in all matters will continue to govern him and that he cannot get rid of it however fixed his determination was, and that it must only be done in a mode recognized by law relying on the following passage of Mayne in his book on Hindu Law: “A man cannot alter the law applicable to himself by a mere declaration that he is not a Hindu. He can only alter his existing status by becoming a member of such a religion as would destroy that status and give him a new one.”’ Justice Ramanujam endorsed it by stating that ‘No exception can be taken to the principle laid down in that case that the personal law of the parties cannot be got rid of except by legislation or in a mode recognized by law.’

In Kashi Nath v. Jaganath, [(2003) 8 SCC] it was clearly stated though the object of an adoption is mixed, both religious and secular, the primary object of adoption was to gratify the means of the ancestors by annual offerings. This was a
stark indication of Personal Laws as a religious rather than a legal category. The judgment cited the case of V T S Chandrasekhara Mudaliar v. Kulandaivelu Mudaliar (AIR 1963 SC 185) which held that substitution of a son for spiritual reasons is the essence of adoption, and consequent devolution of property as mere accessory to it; the validity of an adoption has to be judged by spiritual rather than temporal considerations and devolution of property is only of secondary importance. Also cited was Hem Singh v. Harnam Singh (AIR 1954 SC 581) where it was observed by this court that under the Hindu law adoption is primarily a religious act intended to confer spiritual benefit on the adopter.

It will be useful to recall that the legislation on adoption (discussed in Chapter 4) clearly states that adoption is for spiritual as well as temporal reasons. The provision of giving a single woman the right to adopt is indicative of not making the spiritual reason an exclusive reason for adoption. The 2003 decision of the Supreme Court, however, makes the spiritual reason the primary reason.

The Court has also held that the component of religious upbringing is a significant criterion is deciding the welfare of a minor. In Nirmala v. Nelson Jeyakumar, a case regarding the custody of a minor the Court held that in considering the welfare of the infant religious upbringing is of great importance. The judgment states that, “The father has every right to bring up his child in the religious atmosphere to which he belongs. The courts should also look to the spiritual welfare of the minor, in which context, the religious upbringing may be an element of great importance. It is in evidence that the mother has embraced to Jehovah faith. The father was and is opposed to such a faith and the daughter is attending the Church regularly along with her father and is also observing all the ceremonies of Christian religion. In wardship proceedings, while considering the welfare of an infant, the
element of religious upbringing is of great importance. When the mother is practicing a different cult than the religion of the father and the father has every right to bring up his daughter according to his religion in order to have a religious upbringing, in this context, entrusting the minor to the custody of the mother has every possibility of making a change or conversion to the cult which she is now professing and, therefore, the genuineness of the conscientious feelings of the father appears to be reasonable and also in the interest of the infant.'

In deciding that religious upbringing is important for the child’s well-being and in deciding that the religion in which the child has to be bought up should be the father’s religion the Court violates Article 15 of the constitution that prohibits discrimination on the basis of religion and gender.16

A tendentious 1983 judgment gave an unprecedented, formulaic, virtually religious sanctity to Hindu personal law by insisting on a supreme and unchangeable regime of primordiality. In Vilayat Raj v. Sunila17, Justice Leila Seth of Delhi High Court ruled that not only if a Hindu spouse converts to Islam the marriage could only be dissolved under the Hindu personal law in which it was solemnized, but further that ‘even if both the parties to a Hindu marriage get converted to a religion other than Hindu, their earlier Hindu marriage could only be dissolved under the provisions of the Hindu Marriage Act (1955)’. An indefensible and dubious extension of the Special Marriage Act (which was meant for inter-religious marriages and justifiably allowed dissolution of marriage, conversion notwithstanding, only under the same Act), was made to Hindu personal law.18

In Aruna Roy v. Union of India19 the Supreme Court stated, “None can dispute that in secular society, moral values are of utmost importance. Society where there are no moral values, there would neither be social order nor secularism. ...
values are virtues in an individual and if these values deteriorate, it will hasten or accelerate the breakdown of the family, society and nation as a whole. ... for controlling wild animal instinct in human beings and for having civilized cultural society, it appears that religions have come into existence. Religion is the foundation for value base(d) survival of human beings in a civilized society. The force and sanction behind civilized society depends upon moral values.”. This implies that the solidarity of the nation is itself dependent on moral values based on religion, a dangerous basis for a nation which considers itself a multicultural democracy.

As mentioned earlier the court in the process of delineating the religious aspects of the term ‘Hindu’ started determining the religious aspects of Hinduism. This is amply proved in several cases including that of R M K Singh v. State.20 The judge here observed, “I have sufficiently indicated that the performance of Shradh, offering of Pindas and observance of other religious ceremonies and rites are integral part of the Hindu religion and religious practices ...’

On the one hand, the court determines the religious elements of being a Hindu, on the other hand it also takes it upon itself to decide who is a Hindu. It upholds that citizenship is not a qualification to be a Hindu.21 The case also cited Smt. Indumatee Koorich v. the Family Court, Lucknow - 1993 All.L.J. 1379, as a precedent which stated. ‘That a reading of the provisions of Hindu Adoption and Maintenance Act, per se, does not per se bring in the concept of citizenship as an imperative or necessary qualification for the application of the Act ... That a perusal of the similar provisions of Hindu Marriage Act. 1955, Hindu Succession Act, Hindu Minority and Guardianship Act also reveal this position that for application of the provisions thereof, citizenship is not a necessary imperative condition, instead what is essential is that the parties must be “Hindus”.'
Gender Discrimination/Equality

In spite of the Supreme Court's own view in 1993 that a purposeful meaning which may have become necessary by passage of time and process of experience, has to be given and that the Courts must face the facts and meet the needs and aspirations of the times, a context specific interpretation has been resisted by the same court in the following years. This has been proved in its judgment in Rajendra Kumar v. Kalyan. The case was to decide the validity of adoption by a widow to her husband. According to S. 8 of the Hindu Adoptions and Maintenance Act, a Hindu widow has the right to adopt a child to herself. The statute, however, is silent in the event of the child adopted to her husband. In the event of the law remaining silent the law prior to enactment had been taken recourse to. In shastric law such an adoption can be validated only on the basis of express authority of the husband. The Court did not think it necessary to give a creative interpretation to S. 8, allowing for its growth over time to include the widow's right to adopt to her husband without the husband's express consent. The fact that the Hindu Code Bill declared all laws in force with regard to the provisions enacted in the Hindu Code Bill as null and void was conveniently forgotten. What was also resisted was giving a liberal and context sensitive interpretation to the law. The law is merely silent on the point, it does not expressly forbid such an adoption.

Also see Gurdial Kaur v. Manghal Singh (AIR 1968, Punjab, 396) and Sudha v. Sankappa Rai (AIR 1963, Mysore, 245) later in the chapter.

Fundamental rights and Personal Law

This section begins by looking at the way the court has interpreted the scope accorded to Article 25 to include a diversity of opinions of members within the community. It then looks at the scope of Article 13 that deals with conflict of other
laws with the Fundamental Rights and its applicability to Personal Laws by the Courts.

In Commission of Hindu Religious Endowment v. Lakshmindra the Supreme Court on the scope of Article 25 held that 'A religion may not only lay down a code of ethical rules for its followers to accept, it might preserve rituals and observances, ceremonies and modes of worship which are regarded as integral part of religion and these forms and observances might extend even to matters of food and dress. The guarantees under our Constitution not only protect the freedom of religious opinions but it also protects acts done in pursuance of expression and practice of religion in article 25.' (Italics mine) It is noteworthy that the Supreme Court has mentioned preservation of rituals and ceremonies as well as freedom of religious opinions. Read together, the article can be interpreted to cover the opinions of members regarding the rituals and ceremonies of religion and gives space for the expression and practice of the religious opinions of the members.

Article 13 states that — (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. (3) In this article, unless the context otherwise requires, — (a) ‘law’ includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) ‘laws in force’ includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any
part thereof may not be then in operation either at all or in particular areas; (4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

In State of Bombay v. Narasu Appa\textsuperscript{24}, Chief Justice Chagla, in his judgment stated that ‘laws in force’ in Article 13(1) did not include the personal laws. He pointed out that the definition of ‘law’ in 13 (3) (a) did not include the personal laws. From the same definition he inferred that ‘customs and usages’ were within the ‘laws in force’ in 13(1) and would be void if in conflict with the Fundamental Rights. As far as 13(2) is concerned, the prohibition is against the State ‘making’ any law. Since Personal Laws are drawn from religious texts, the State cannot make Personal Laws.\textsuperscript{25}

The Court thus put Personal Laws beyond the ambit of Article 13. What again comes to the fore is that the courts are working with the concept of ‘Hindu’ as a religious category as is evident from the reference to religious texts to determine the content of Personal Law. This is after the Hindu Code Bill has clearly referred to ‘Hindu’ as a legal category. For a court that resists context specific and context sensitive creative interpretations on the ground that the working of a Parliamentary democracy and the phrase ‘due process of law’ in the Constitution limit its scope of interpretation by the wording and intent of the legislature, the divergence with not just the Constitution but also the legislated act clearly indicate its lack of consistency.

The issue of conflict between Personal Laws and Part III again came up in Youth Welfare Federation v. Union of India.\textsuperscript{26} The plea was to strike down Section 10 and 22 of the Indian Divorce Act as violative of Article 13(1), 14, 15 and 21.
It was held by the court that, 'The proposition of invalidity of personal laws which are inconsistent to Part III would only be partially correct i.e., that the statutory personal laws and customs or usages having the force of laws only are subject to the paramountcy of the fundamental rights but it has to be held, by necessary interpretation, that non-statutory personal laws at the commencement of the Constitution transcend the fundamental rights.' ‘It is to be found as to what was the real intention of the Constitution when it said that all laws in force in the territory of India immediately before the commencement of the Constitution shall be void to the extent they are inconsistent with Part III. It is indeed very difficult to conceive that the framers of the Constitution did ever visualize that on one day, when the Constitution is introduced, all laws of all communities would be ironed out of all their differences by application of the fundamental rights and the differences of religious perception, custom, practice, nay of the very ways of livings of this vastly heterodox multitudes of communities would be deprived of their individuality in the matters of religion and religious practices. The enormity of the resultant situation would have prevented any such contemplation to have been ever made and indeed no such precipitative action could ever have been intended as is clear from Article 44 which put the introduction of a uniform civil code not in Part III but in Part IV, as a goal to be achieved in good time when situation conducive to it prevails. If by mere force of Article 13 the object of uniformity would have been stood achieved, there would have been no necessity for placing Article 44 on the body of the Constitution.’

The court apart from the Narasu Appa Mali case also placed reliance on the Krishna Singh v. Mathura Ahir case (AIR 1980 SC 707) and agreed that Part III of the Constitution of India does not touch upon the personal laws of the parties and
that in applying the personal laws of the parties, the judge could not introduce his own concepts of the modern times, but should have enforced the law as derived from recognized and authoritative sources of Hindu Law, i.e., Smritis and Commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom, or is modified or abrogated by statute.

Some of the reasons given by the court to not uphold the Fundamental Rights over Personal Laws do not even resort to religious texts.

For example, in Gurdial Kaur v. Manghal Singh, it was argued that a custom of a particular caste that excluded a mother, who was a widow, from the succession to the estate of her deceased son if she had remarried, but not the father under the same circumstances violated Article 15. The court rejected the argument and made the following observations, 'It would be impossible to have different laws in this country, and the Court will have to go the length of holding that only one uniform code of laws relating to all matters covering all castes, creeds and communities can be constitutional,' and that 'it is too much to suggest that all heirs belonging to any sex must have the same rights of inheritance.'

The doctrine of classification was used to endorse discriminatory provisions against women in Sudha v. Sankappa Rai. It was argued that an act passed by Madras relating to marriage and divorce in the Aliyasanthana community denied equal protection of laws as guaranteed by Article 14. The Act provided that if a petition for divorce had been filed and a specified amount of time had elapsed, the Court should grant a divorce without enquiring into the grounds a party might have, an approach that was in accord with the custom of the community. The court held that this was not a case of 'discrimination', but of 'classification'. It went on to state, 'Each of these laws has a history of its own. No section of the community is shown
to have been subjected to hostile discrimination, to adversely affect the rights of a section of the people or an individual, but classification is to advance the cause of a section of the people without harming the interests of the others.’

The classification criterion was also used in S Y Jadhav v. Bala G Yadav\textsuperscript{29} to tackle the issue of conflict between Fundamental Rights and Personal Law. It was argued that S. 15(2) of the Hindu Succession Act discriminates between heirs of husband and heirs of wife. It was contended that this was a legislative discrimination based on sex differentia and, therefore, void and ultra vires under the guarantee of equal treatment under Article 14 and discriminatory on the ground of sex and, therefore, invalid under Article 15 of the Constitution. According to the judgment, “The Constitution does not posit totally unguided non-classified equality. Equal protection under the laws is not an abstract proposition. Laws are intended to solve specific problems and achieve definite objectives and hence absolute equality on (or) total uniformity is impossible an achievement. The governing principles of Article 14 operate upon the field that amongst the equals the laws should be equal and be so administered. Discrimination is forbidden between the classes and persons who are substantially similarly circumstanced. If the persons or groups are rationally classified and such classification bears the testimony of long standing position of the personal law, then surely law can reach them differently and such different treatment would not result in discrimination. If the classification is founded on intelligible differentials and has rational relation to the object the legislative provision is intended to achieve, then such a challenge can hardly merit acceptance. It is only when the discrimination is based only on consideration of difference of sex amongst the same class that the challenge under Article 15 could be substantiated.”
While viewing it as a sex-based classification, the court forgot that it is precisely an unfavourable sex-based classification that is covered by the term ‘discrimination on the ground of sex’ in Article 15. The only sex-based classification permitted in Article 15(3) is sex-based classification in favour of women.\textsuperscript{30} As Krishna Iyer remarked, the doctrine of classification is threatening to replace the doctrine of equality.

The court has however not always favoured Personal Laws over Fundamental Rights. In the case of Ammini E J v. Union of India\textsuperscript{31} a Special Bench of the Kerala High Court found Section 10 of IDA to be ultra vires of articles 14, 15 and 21. (Under S. 10 of the Indian Divorce Act a husband can divorce his wife on grounds of adultery alone but a wife can do so only if adultery is of a particular kind or coupled with some other act).

The judges in Ammini E J v. Union of India observed: “... we are of the view that life of a Christian wife who is compelled to live against her will ... as the wife of a man who hates her, has cruelly treated her and deserted her putting an end to the marital relationship irreversibly will be a sub human life without dignity and personal liberty. It will be a humiliating and personal life without the freedom to remarry and enjoy life in the normal course. It will be a life without the freedom to uphold the dignity of the individual in all respects as ensured by the Constitution in the preamble and in Article 21. It will be a life curtailed in various fields of human activity.” They further stated, “We are also inclined to take the view that the impugned provisions (S.10) ... are highly harsh and oppressive and as such arbitrary and violative of Article 14 of the Constitution of India.”

S. 22 of IDA that provides for decree of judicial separation without any provision for ripening of the decree to one of divorce as a result of which parties to
the decree would have no liberty to marry again since the bond of marriage between them continues to subsist. The Special Bench of the Kerala High Court in Ammini’s case considering the question of S.22 of the IDA took the view that as the spouses belonging to all other religions ... are entitled to get dissolution of their marriage on the ground of cruelty or desertion ... denial of such ground metes out a discriminatory treatment to Christian spouses. The Court held the absence of suitable provisions recognizing cruelty and desertion for a reasonable period as grounds for dissolution of marriage in the Act to be discrimination based solely on religion and as such violative of Article 15 of the Constitution.

*Special Marriage Act and its Limitations*

In recent judgments, the judiciary has also assisted in closing routes of exit from personal law in its perusal of the 1976 amendment. In the 19th century, and even till the 1930s, conversion of an individual, family, caste group or community to either Sikhism, Islam or Christianity did not always lead to a change of personal law which was in part retained or engrafted as a custom on personal law. A clear indication of this is Maneka Gandhi v. Indira Gandhi. It was held that succession of Hindus whose marriage was solemnized under the Special Marriage Act is governed by the Hindu Succession Act and not by the Indian Succession Act. This hit the interests of the Hindu female as she would not stand to benefit in a Hindu coparcenary unlike the Indian Succession Act that gives equal rights to men and women.

*Section 125 Cr. P.C. and its Limitations*

Section 125 Cr.P.C is a secular law of maintenance enacted in its present form in 1973. The law allows maintenance particularly to women of those communities whose Personal Law disqualify them to seek maintenance.
This section ran into controversy in 1986 with the Shah Bano case. Before the Shah Bano case decisions had been delivered by the Supreme Court to Muslim women under Section 125 CR.PC. Two decisions of the Supreme Court delivered by Krishna Iyer in 1979 and 1980 placed a divorced Muslim woman’s right to maintenance on a secure footing without arousing a political controversy around the issue. What provoked the controversy in the Shah Bano case was the judgment’s lament of Article 44 remaining a dead letter. The judge stated, ‘It is a matter of regret that Article 44 of our Constitution has remained a dead letter ... a common civil code will help the cause of national integration by removing disparate loyalties to laws that have conflicting ideologies. This insensitivity to the cultural practices of a minority community provoked a backlash that culminated in the Muslim Women’s Act, 1986 judgment. The Act sought to exclude divorced Muslim women from the purview of Section 125 Cr.PC by settling maintenance as a one-time payment.

With the Shah Bano controversy and the enactment of the Muslim Women’s Act, the Courts have been insisting on the validity of relations evaluated against the Personal laws of the concerned parties to claim maintenance under Section 125Cr.PC.

The courts have also managed to however find innovative ways to apply Section 125 Cr.PC to Muslim women. Subanu alias Saira Banu v. A M Abdul Gafoor is a case in point. In this case the question that has come up for consideration before the Supreme Court was whether a Muslim wife whose husband has married again is worse off under law than a Muslim wife whose husband has taken a mistress to claim maintenance from her husband. The main defence raised was that since the husband is permitted by Muslim law to take more than one wife his second marriage cannot afford a legal ground to the wife to live separately and
claim maintenance. The Supreme Court held that irrespective of the husband's right under his personal law to take more than one wife, his first wife would be entitled to claim maintenance and separate residence if he takes a second wife.

The Supreme Court, it could be said has gone a step further in this case after the judgment in Shah Bano's case in analyzing the provisions of Explanation to sub-s. (3) of S. 125. Indeed in the decision itself, it is stated that the Explanation calls for a more intrinsical examination that has been done hitherto. It has been observed that the earlier decision of the High Courts and the Supreme Court have taken into consideration only the first limb of the Explanation.

Interpreting the second limb of the Explanation to S. 125 (3) which hitherto remained unconsidered, in the context of the main defence plea that the husband under Muslim law has the right to take more than one wife, the Supreme Court held that the Explanation has to be constructed with reference to the two classes of injury to the matrimonial rights of the wife, viz., caused by (a) taking of a second wife and (b) by taking of a mistress as contemplated by the Explanation and not with reference to the husband's right to marry again. When so construed, the view that the wife will be entitled to refuse to live with the husband if he had taken a mistress but cannot refuse likewise if he has married a second wife will lead to discriminatory treatment between wives whose husbands have lawfully married again and wives whose husbands have taken mistresses.

The judgment states, "The purpose of the Explanation is not to affect the rights of a Muslim husband to take more than one wife or denigrate in any manner the legal or social status of a second wife to which she is entitled to as a legally married wife, as compared to a mistress but to place on an equal footing the
matrimonial injury suffered by the first wife on account of the husband marrying again or taking a mistress during the subsistence of the marriage with her.”

The court however retracted from this stand in Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav. It stressed on the point that the validity of the relation is crucial to claim maintenance under S.125 Cr. P. C. and validity is established only through the personal laws of the parties. It went on to state that, “The contention that the term ‘wife’ in S. 125 of the Code of Criminal Procedure, 1973 should be given a wide and extended meaning as to include not only a lawfully wedded wife but also a woman married in fact by performance of necessary rites and following the procedure laid down under the law is untenable. The legislature decided to bestow the benefit of S. 125 even on an illegitimate child by express words but none are found to apply to a de facto wife where the marriage is void ab initio.’

Muslim Women (Protection of rights on Divorce) Act 1986 and the issue of maintenance

Even as the Act was accused of being against the interests of Muslim woman and the Constitution as it deprived the Muslim women of the rights granted under a secular provision, S.125Cr.PC, on the basis of religion alone, appeals started accumulating from the rulings of various High Courts by aggrieved husbands suggesting that the anti-women statute can be interpreted to the advantage of women.37

A seemingly innocuous clause, which had missed the attention of protesters and defenders alike, had been invoked by a section of the judiciary, to pronounce judgments, which provided greater scope for protection against destitution. Section 3(1) of the Act stipulated: Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to: (a) a reasonable and
fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

The above clause, along with the preamble: 'An act to protect the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands and to provide for matters connected therewith or incidental thereto ...' provided sufficient scope for a positive and pro-women intervention.  

The courts' decisions of interpreting the Act in a liberal way as well as creatively circumventing the Act proved the possibility of not surrendering to the plea that judges simply apply, they cannot legislate. Justice Krishna Iyer's statement way back in 1980 that a socially sensitized judge is a better statutory armour against gender outrage, than long clauses of a complex statute with all the protections writ into it came to be applied.

Referring to the Muslim Women's Act in Arab Ahemadhia Abdulla v. Arab BailMohmuna Saiyadbhai, Justice M B Shah ruled that: '... Under S 125 Cr.PC, the maximum amount which a divorced woman would get is only Rs. 500, even though her former husband is a rich person. Therefore to give her full protection or benefit, this Act was enacted and her rights are specified ... It has not only provided for free and fair provision and maintenance to the divorced woman and her minor children, but it has also specifically provided that she is entitled to get mehr or dower amount from her former husband.'

In 1995, Justice T V Ramakrishnan of the Kerala High Court dismissed the petition of K Haji who pleaded that the maintenance amount of Rs. 30,000 as one-time settlement after divorce granted to Amina, his ex-wife, by the sessions Court was illegal under the 1986 Act which granted 'reasonable and fair provision' and maintenance during the period of iddat. Justice Ramakrishnan ruled that: 'We are of
the view that the Legislature has deliberately used the two provisions ‘provisions’ and ‘maintenance’ with the intention of expressing two different things or ideas … Following the Shah Bano case, the revolt from a section of the Muslims was only against the continued liability (post-iddat) declared by the Supreme Court. There was no dispute regarding iddat maintenance. From the statement of objects and reasons, it is evident that the Parliament has enacted the new legislation partly to contain the revolt … and to protect the rights of divorced women who may not have the necessary means of livelihood after the period of iddat. It is difficult to think that Parliament has, by enacting the Act, completely taken away the right of Muslim divorced women under Section 125 Cr.PC … without making any provision as a compensatory measure …

While the 1986 Act can be interpreted to benefit woman, it is possible only when interpreted by a pro-woman judge.

An anomaly of the Muslim Women Act was that while it allows the mother to be the natural guardian of her children, it does not spell out the responsibilities of the father in providing child support following divorce. A Calcutta High Court decision found a way to circumvent the 1986 Act, and restore to the destitute woman her right to Section 125 Cr. P.C. but only in her role as mother. The Calcutta High Court stated in Mohammad Murtaza v. Kauser Parveen that ‘The Act of 1986 is remarkably silent as to the futures of the minor children who have crossed the age of two years … As no provision is made subsequent to that age in the Act of 1986, the mother as natural guardian of such unfortunate minor children shall have to fall back upon the all-embracing and beneficial provisions of Section 125 Cr. P.C.’

It was also held in Noor Saba Khatoon v. Mohd. Quasim that under Muslim Women (Protection of rights on Divorce) Act 1986, ‘… both under the
personal law and the statutory law (S. 125 Cr. P. C.) the obligation of a Muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, till they attain majority and in case of females till they get married, is absolute, notwithstanding the fact that the minor children are living with the divorced wife."

Danial Latifi v. Union of India\textsuperscript{46} was a breakthrough case in the interpretation of the Muslim Women Act. It was held that the term 'a reasonable and fair provision' would be worked out with reference to the needs of the divorced women, the means of the husband and the standard of life enjoyed during subsistence of the marriage. It was also stated that the divorced woman has been defined as a 'Muslim woman who was married according to Muslim law and has been divorced by or obtained divorce from her husband in accordance with the Muslim law.' But the Act does not apply to a Muslim woman whose marriage is solemnized either under the Indian Special Marriage Act, 1954, or a Muslim woman whose marriage was dissolved either under the Indian Divorce Act, 1869, or the Indian Special Marriage Act, 1954. The Act does not apply to deserted and separated Muslim wives. The maintenance under the Act is to be paid by the husband for the duration of the iddat period and this obligation does not extend beyond the period of iddat.

\textit{Uniform Civil Code and its Limitations}

A Special Bench of the Calcutta High Court saw the UCC as a remedy to discrimination in the Indian Divorce Act. It endeavoured in Swapna Ghosh v. Sadanand Ghosh\textsuperscript{47} to "draw the attention of our concerned Legislature to this anachronistic incongruities and the provisions of Article 15 of the Constitution forbidding all discrimination on the ground of Religion or Sex and also to Article 44
staring at our face four decades within its solemn directive to frame a Uniform Civil Code.

In Ms. Jorden Diengdeh v. S S Chopra, Justice Chinnappa Reddy observed, 'It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste.' 'We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out …'

The Supreme Court responding to the writ petition from a Christian priest, John Vallamattom, that challenged Section 118 of the Indian Succession Act, 1925 provision as it discriminated against Christians bequeathing their property for charitable and religious purposes, has suggested that Parliament frame a common civil code for the country as that would help the cause of national integration. A three-judge bench, comprising Chief Justice, V N Khare, Justice S B Sinha and Justice A R Lakshmanan, made this suggestion while declaring as unconstitutional Section 118 of the Indian Succession Act, 1925 (ISA) on the ground that it was arbitrary, irrational and violated Article 14 of the Constitution. (Article 14 says that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India.)

Under Section 118 of the ISA, applicable only to Christians, 'no man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than 12 months before his death and deposited within six months from its execution in some place provided by law for safe custody of the will of living persons.'
The Bench said that while Article 25 of the Constitution guaranteed freedom of conscience, practice and propagation of religion, Article 44 (the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India) divested religion from social relations and the personal law. The Bench observed: 'It is no matter of doubt that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Article 25 and 26 of the Constitution (right to freedom of religion).

It was of the view that any legislation which would bring succession and the like matters of a secular character within the purview of these two Articles was suspect.

Writing the main judgment, the Chief Justice observed 'it is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.'

The Indian judiciary has exhibited formalism as well as rule-skepticism in the last fifty years. It has, however, not exhibited context-based application and sensitivity very frequently. To the extent, the judiciary in India is working within the framework of a Parliamentary democracy and constrained by the 'due process' clause, the only way for the Indian courts is to acknowledge the open texture of language and work out the 'core of settled meaning' and 'penumbra of uncertainty' that every law possesses. One of the ways to do it is to follow what Dworkin calls 'constructive interpretation.' On this view the best interpretation will satisfy two criteria, of 'fit' and of 'appeal.' Criteria of fit concern the ability of the interpretation to accommodate the uncontroversially observable features of the practice. An
interpretation need not be a perfect fit, but it must come up to a certain threshold of adequacy. Within the constraints of fit, we must choose the interpretation that makes the practice into the most appealing practice it can be from a moral point of view. Dworkin’s theory of interpretation presents legal theory as having both a descriptive and a prescriptive aspect. Interpretive theories of law will be descriptive to the extent that they must satisfy the constraints of ‘fit’; they will be prescriptive in so far as one must choose the morally most appealing interpretation amongst those that satisfy the constraints of fit.¹⁰
END NOTES


(3) Supreme Court Advocates on Record Association v. Union of India, 1993 SC 268.

(4) AIR 1993. SC.


(7) AIR 1972 Andhra Pradesh. 156

(8) 2MLJ (2001) 444


(13) Madras Law Journal 1971(2)

(14) (2003) 8SCC, 740

(15) Madras Law Journal 1998(3)
(17) AIR 1983 Delhi
(19) AIR 1983 Delhi
(20) AIR 1976 Patna 198
(22) AIR 2000 SC
(24) AIR 1952, Bom., 89
(26) ALT, 1996(4)
(27) Gurdial Kaur v. Manghal Singh AIR 1968, Punjab, 396
(29) Bombay Law Reporter. 1983
(31) Ammini E J v. Union of India. AIR 1995 Kerala 252
(32) AIR 1985 Delhi, 114
(33) Mohommed Ahmad Khan v. Shah Bano Begum and Others. AIR 1985 SC, 945
(35) AIR 1987 SC
(36) Bombay Law Reporter, 1988


(40) AIR 1988, Gujarat 141


(44) 1991, Cri L J, 3202

(45) AIR 1997 SC

(46) [2001] 7 SCC

(47) AIR 1989 Calcutta I

(48) AIR 1985. SC 935.

(49) ‘SC suggests framing of a common civil code’ July 24th, 2003. The Hindu